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No. 86-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SUBURBAN O'HARE COMMISSION; THE VILLAGE OF ADDISON; THE VILLAGE OF BENSENVILLE; THE CITY OF DES PLAINES; THE VILLAGE OF ELK GROVE VILLAGE; THE CITY OF ELMHURST; THE VILLAGE OF FRANKLIN PARK; THE VILLAGE OF HARWOOD HEIGHTS; THE VILLAGE OF ITASCA; THE VILLAGE OF NILES; THE VILLAGE OF NORRIDGE; THE CITY OF PARK RIDGE; THE VILLAGE OF SCHILLER PARK; THE CITY OF WOOD DALE; and LAWRENCE C. BIENEMAN,

Petitioners,

v.

ELIZABETH HANFORD DOLE, Secretary of the Department of Transportation; UNITED STATES DEPARTMENT OF TRANSPORTATION; RUSSELL A. OLSON, Regional Representative of the Department of Transportation, Region V; DONALD ENGEN, Administrator of the Federal Aviation Administration; FEDERAL AVIATION ADMINISTRATION; PAUL BOHR, Director, Great Lakes Region, Federal Aviation Administration; JOHN GUIDOTTI, Supervisor, Illinois Section, Chicago Airports District Office, Federal Aviation Administration; THE CITY OF CHICAGO, a municipal corporation; and JEROME R. BUTLER, Commissioner of the Department of Aviation of the City of Chicago.

Respondents.

REPLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTRODUCTION

The issues before this Court focus on the standards and procedures for addressing material issues of disputed fact relevant to the legality of government action and the meaning and application of the doctrinal terms of art – "substantial evidence" and "arbitrary and capricious" – in addressing material issues of disputed fact.[1]

Respondents' briefs illustrate the fog of confusion that currently swirls over the determination of material issues of disputed fact relevant to the legality of government action. Instead of the consistent, historical understanding of the meaning and application of such terms of art as "substantial evidence" and "arbitrary and capricious", respondents rely in their briefs on decisions that say both: 1) that "substantial evidence" and "arbitrary and capricious" are the same; and 2) that "arbitrary and capricious" and "substantial evidence" are different. Respondents do not devote one word to the analytical bases for these inconsistent lines of cases.

This Court needs to act now to clear up this confusion in two related areas:

1. Confusion over the meanings and application of the terms of art "substantial evidence" and "arbitrary and capricious" as these terms relate to material issues of disputed fact relevant to the legality of government action.

2. Confusion over the related jurisdictional competence of the courts of appeal to address material issues of disputed fact which have not been tried and determined in an agency trial below.

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[1] Respondents appear to agree that there were genuine issues of material fact relevant to the legality of the FAA's decision under the Airport and Airway Improvement Act of 1982, 49 U.S.C. Section 2201, *et seq.*, to approve the O'Hare Expansion Project.

I. THE COURT MUST CLEAR UP THE CONFUSION OVER THE MEANING AND APPLICATION OF THE TERMS "SUBSTANTIAL EVIDENCE" AND "ARBITRARY AND CAPRICIOUS"

In exercising jurisdiction under 49 U.S.C. Section 1486, the Court of Appeals acknowledged Congress' explicit command that material issues of disputed fact be reviewed under the "substantial evidence" test. Yet despite the clear doctrinal history and analytical structure of the test, lower courts are ascribing dramatically different meanings to the same term: "substantial evidence".

A. Application of the Substantial Evidence Test Necessitates a Contested Hearing In the Agency Below On Disputed Issues of Material Fact

The doctrine of "substantial evidence" – as embodied in the Administrative Procedure Act and as embodied in this Courts' decisions in *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939) – is a doctrine of appellate-style review of material issues of disputed fact premised on the fundamental assumption that there has been a contested hearing of those material issues of disputed fact in the agency below.

Thus, this Court was correct in that portion of its *Overton Park* decision that the substantial evidence test could not be applied if there had been no contested hearing below.

> *Review under the substantial-evidence test is authorized only* when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U.S.C. Section 553 (1964 ed., Supp. V), *or when the agency action is based on a public adjudicatory hearing.* See 5 U.S.C. Sections 556, 557 (1964 ed., Supp.V).
>
> *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 414 (1971) (emphasis added).

This Court recognized this requirement again in *Steadman v. SEC*, 450 U.S. 69 (1981).

> Substantial evidence review by the Court of Appeals here required a hearing on the record. [citations omitted] Otherwise effective review by the Court of Appeals would have been frustrated.
>
> *Steadman v. SEC*,
> 450 U.S. 69, 97 n. 13 (1981).

The requirement reflected in *Overton Park* and *Steadman* is not a case-specific anomaly. This essential predicate – that substantial evidence review of disputed fact issues be premised on a contested hearing before the agency – has been implicitly and explicitly echoed time and time again in: 1) the genesis and development of the substantial evidence doctrine in review of ICC decision making during the first decades of the 20th century; 2) the adoption of the identical substantial evidence test in the FTC Act of 1914 (and its progeny, including the predecessor to the jurisdictional statute invoked here, 49 U.S.C. Section 1486); 3) the APA; 4) the "whole record" analysis of *Universal Camera*; 5) *Overton Park;* and 6) *Steadman*.[2]

Respondents below invoked – and the Court of Appeals accepted – application of a jurisdictional statute that mandated judicial review under the "substantial evidence" test. Despite the clear legislative history of the APA and the FTC model statutes (of which 49 U.S.C. Section 1486 is an example), the Court of Appeals applied the substantial evidence test without mandating that petitioners first receive a hearing on contested issues of disputed fact. If the statutory command of Section 1486 to decide material issues of disputed fact

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[2]The Department of Justice correctly points out that since the late 1960's, Congress has passed a number of statutes providing for rulemaking with review based on the "substantial evidence" test, without explicitly providing for an agency contested

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under the "substantial evidence" doctrine is to be honored, petitioners must first receive a contested fact hearing before the agency pursuant to 5 U.S.C. Sections 556-557 on those disputed fact issues.

No such hearing was provided here. If this Court wishes to change the structural content and meaning of the substantial evidence doctrine to eliminate the requirement of a prior contested hearing on disputed facts as an essential predicate to substantial evidence review – a position urged by the government – the Court will have to overrule *Overton Park* and seventy years of doctrinal structure.[3]

B. Arbitrary and Capricious Is Not A More Lenient Standard Than Substantial Evidence

Having chosen to exercise jurisdiction under Section 1486, the Court of Appeals could not – as urged by respondents – avoid the clear statutory command to apply the "substantial evidence" test by substituting the allegedly more lenient "arbitrary and capricious" test. First, the holding of this Court in *Vermont Yankee* prohibits the Judiciary from modifying the procedural commands of Congress as to procedures for addressing material issues of disputed fact. Second, the time

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hearing on relevant disputed issues of fact. (Justice Department Brief, p.12). As of this time, this Court has not addressed the question of whether application of "substantial evidence" review under those statutes means something different than "substantial evidence" under the historical framework reflected in the FTC model statutes, the APA, and *Overton Park*. If substantial evidence under those statutes *does* have a different meaning than the substantial evidence – contested hearing on disputed facts – predicate of the APA and *Overton Park*, the difference in meaning illustrates the need for clarification by this Court of the various meanings.

[3] The *Overton Park* decision is built on two analytical pillars. The first pillar deals with the requisite procedures for application of the substantial evidence test. The second pillar deals with the procedures

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is long overdue for this Court to analytically examine the historical and logical content of the "arbitrary and capricious" doctrine.

Unlike the "substantial evidence" test – which is limited to appellate style review of disputed issues of fact where there has been a hearing below – the term "arbitrary" or its synonym "arbitrary and capricious" has significantly different logical and historical antecedents. Contrary to popular misconception and the opinions of some of the circuit courts relied upon by respondents, the arbitrary and capricious standard is not identical to the substantial evidence test. Moreover, contrary to popular misconception, "arbitrary and capricious" does not represent a more *lenient* standard of appellate review of material issues of disputed fact than "substantial evidence". Arbitrary and capricious does represent a *burden of proof* which is more favorable to the government than substantial evidence. But where there has been no requirement of a trial below, the arbitrary and capricious standard has always allowed a trial on disputed facts before the district court.

The confusion over the meaning of arbitrary and capricious stems from at least two sources. First the term "arbitrary

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for dealing with material issues of disputed fact when the substantial evidence test does not apply.

In this case, the government is arguing that the first analytical pillar of *Overton Park* – dealing with the analytical structure of the substantial evidence doctrine – is wrong and should be overruled. In contrast, petitioners argue that this first pillar is analytically and historically correct and governs this case.

As to the second analytical pillar of *Overton Park* – where the substantial evidence test does not apply – petitioners assert that *Overton Park* grievously misreads the legislative history of the APA and develops a judge made rule of procedure for dealing with material issues of disputed fact that is contrary to the overwhelming evidence of legislative intent in the APA legislative history and is directly contrary to the procedural model expressly mandated by Congress in the Administrative Orders Review Act, 28 U.S.C. Section 2341, *et seq.*

and capricious" can have a different connotation depending on three separate circumstances:

1. Where there are material issues of disputed fact relevant to the government action and there has been no trial of disputed issues of fact below and none is required, the district court would try and determine the disputed issues of fact under the either the Constitutional [4], the APA [5], or the Administrative Orders Review Act th[6] models.

2. Where there has been a trial below on the disputed issues of material fact and the claim of arbitrariness relates to the factual determination of the agency trier of fact as to those disputed fact issues. In this situation the concept of arbitrary and capricious has been equated with substantial evidence. *Interstate Commerce Commission v. Louisville and Nashville R.R. Co.*, 227 U.S. 88, 94 (1913).

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[4] Under *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 (1934), Congress cannot insulate either a state statute or a Congressional statute from being challenged as arbitrary and without rational basis. In such a challenge – since no contested fact hearing is required prior to the legislative decision – the district court must try and determine disputed issues as to facts relevant to whether the legislative decision is arbitrary. If neither Congress nor the state legislature can insulate factual claims relevant to the validity of legislation from trial and determination by a district court, *a fortiori*, they cannot create such insulation by delegating the function to an administrative agency.

[5] See the APA legislative history cited in the Petition for Certiorari at pp. 20-21. Indeed, H.Rpt. No. 1980, quoted at p. 21 of the Petition for Certiorari, is the very report incorrectly cited in *Overton Park*, 401 U.S. at 415. Contrary to the statements cited by the United States at p.10 of their typewritten brief, the requirements for a trial of material issues of disputed fact in the district court where there had been no trial below – following the basic constitutional model reflected in *Borden's Farm Products* – permeate the legislative history of the APA. See additional legislative history in the Supplemental Appendix attached to this Reply.

[6] See discussion of Section 2347(b)(3), *infra*.

3. Where there are no disputed issues of material fact – unlike the substantial evidence test, which is limited to review of material issues of disputed fact where there has been a trial below – under the arbitrary and capricious doctrine the Court would still examine whether there was a rational connection between the undisputed facts and the conclusion reached by the agency. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

The second source of confusion leading to the view that "arbitrary and capricious" is somehow more lenient than "substantial evidence" stems from the *dictum* of Justice Harlan in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 143 (1967). In that famous *dictum*, Justice Harlan stated that the "substantial evidence" test provided a " more generous judicial review" than the arbitrary and capricious test.

But that statement must be understood in the context in which it was made – namely the special rulemaking and judicial review provisions of Sections 701(e) and 701(f) of the Food and Drug Act. As noted above, persons challenging a quasi-legislative act of an agency – just like the legislative act of the Congress or a state legislature – had the burden of proof to demonstrate that the factual basis of the regulation was in error. See *Borden's Farm Products.*

The drafters of the 1938 Food and Drug Act wanted to move from this procedure – where the opponents of a regulation had the burden of proof to overcome the rebuttable factual presumption supporting the legislative decision – to a procedure where the agency had the burden of proof and had to prove its case in an agency trial with judicial review of disputed issues of fact based on the substantial evidence test. Nothing in the FDA special procedures – agency trial prior to rule adoption followed by judicial review based on substantial evidence – eliminated the *Borden's Farm Products* requirement (in the absence of such special procedures) that where there was no required hearing below, the person challenging the rule as arbitrary had a right to have factual issues tried and determined by the district court.

II. THIS COURT MUST RESOLVE THE JURISDICTIONAL AND SCOPE OF REVIEW CONFLICTS CAUSED BY DIRECT COURT OF APPEALS REVIEW UNDER FTC MODEL STATUTES WHERE THERE HAS BEEN NO HEARING BELOW AND THERE ARE MATERIAL ISSUES OF DISPUTED FACT

The conundrum faced by the Court of Appeals below – where it first assumed jurisdiction under Section 1486 and then sought to wish away the doctrinal structure of the "substantial evidence" command expressly mandated by the statute – arises from two related problems. First, the Court of Appeals took an expansive view of its jurisdiction without examining the historical structure of direct court of appeals review, the role of the substantial evidence doctrine in that direct court of appeals review structure, and the historical understanding that courts of appeal were ill-equipped to decide controversies based on disputed issues of fact which had not been tried and determined below. The jurisdictional grant of the FTC model and its progeny, including Section 1486, were premised on the trial of disputed facts in a contested hearing before the agency and application of the substantial evidence review to those disputed facts on appeal.

It was not until the Judicial Conference of the United States developed a procedure for direct court of appeals review of disputes where there was no contested hearing below, that the courts of appeals could take jurisdiction over such controversies. The procedure developed by the Judicial Conference and adopted by Congress in the Administrative Orders Review Act, 28 U.S.C. Section 2341, *et seq.* is expressly mandated by Congress in Section 2347 of that Act.

Contrary to the respondents' arguments, the Administrative Orders Review Act is not limited to some narrow category of cases. The Act and its procedural framework for addressing material issues of disputed fact – Section 2347 – govern judicial review of a broad range of agencies, including the FCC, the Nuclear Regulatory Commission, the

Department of Agriculture, the Federal Maritime Commission and the Interstate Commerce Commission. If this Court is going to expand its interpretation of the jurisdictional grant of FTC model statutes (such as Section 1486) – *without Congressional authorization* – to now include review of agency decisions involving untried material issues of disputed fact, the Court should at least incorporate across the board the procedures mandated by Congress for addressing material issues of fact where there has been no hearing before the agency.

The second problem facing the Court below is the direct contradiction between this Court's erroneous reading in *Overton Park* of the legislative history of the APA – as it relates to procedures for addressing material issues of disputed fact where there has been no hearing below – and the explicit language of the Administrative Orders Review Act. There is a direct intellectual and constitutional conflict between: a) the procedures which this Court in *Overton Park* said Congress mandated in the APA for addressing material issues of disputed fact when no agency contested hearing was required; and b) the explicit procedures mandated by Section 2347(b) of the Administrative Orders Review Act.

Under Section 2347(b)(3) where there is a genuine issue of material fact and there has been no agency trial below and none is required by law, the statute mandates the court of appeals to:

> transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

Under the teaching of *Vermont Yankee,* neither the lower courts nor this Court are free to ignore this express statutory command. *Cf. Agosto v. Immigration and Naturalization Service,* 436 U.S. 748 (1978) (where this Court reversed a

court of appeals refusal to remand for district court trial of disputed facts under a statute which had been patterned after the Administrative Orders Review Act). To the extent this Court's *dictum* in *Florida Power and Light Co. v. Lorion* ___U.S. ___, 105 S.Ct. 1598 (1985), indicates that disputed issues of fact – where there was no required agency trial below – should not be tried and determined in the district court, the *dictum* is in direct violation of Congress' command in 28 U.S.C. Section 2347(b)(3) and thus violates this Court's own holding in *Vermont Yankee* that the courts are not free to ignore the procedural commands of Congress. Refusal by this Court to follow the Congressional command of 28 U.S.C. Section 2347(b)(3) would be an unconstitutional usurpation of Legislative power by the Judiciary.

CONCLUSION

Petitioners again respectfully request that the Petition for Certiorari be granted.

Respectfully submitted,

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Additional Legislative History of the Administrative Procedure Act

The Senate Judiciary Committee, in a comment on Section 554, the section which deals with adjudication, stated:

> There should be no disposition to compel administrative hearings where Congress has not already so provided because, as pointed out below in connection with judicial review the established law permits a trial *de novo* of the facts in all cases of adjudications where statutes do not require an administrative hearing. Moreover, as to the subjects triable *de novo* in the courts, although the administrative procedure may in some instances shift the burden of proof the parties have the right to ultimate full judicial process.
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> *Legislative History of the Administrative Procedure Act*, S.Doc. 248, 79th Cong. 2d Sess. (1946) (hereafter "Legis. Hist.") at 22.

Similarly, in a comment on Section 706(2)(E) (relating to appellate-type review "on the record" under the "substantial evidence" test) and on Section 706(2)(F) (relating to *de novo* trial of disputed facts), the Senate Judiciary Committee stated:

> The fifth category [706(2)(E) – substantial evidence appellate review "on the record"] necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing in which an administrative record may be made. The sixth category [706(2)(F) – *de novo* trial in the district court] expresses the correlative situation in which Congress has not provided by statute for an administrative hearing and consequently any relevant facts must be presented *de novo* to original courts of review (see *Kessler v. Streckler*, 307 U.S. 22, 35 (1939)). It should be noted that the sixth category, in accordance with the established rule, would permit trial *de novo* to establish the relevant facts as to the applicability of any rule and as to the propriety of

adjudications where there is no statutory administrative hearing.

Legis. Hist. at pp. 38-39.

Again, the Senate Judiciary Committee commented:

The sixth category [*de novo* review], respecting the establishment of facts upon trial *de novo,* would require the reviewing court to determine the facts in any case of adjudication not subject to sections 7 and 8 [556 & 557]. It would also require the judicial determination of facts in connection with rule making or any other conceivable form of agency action to the extent that the facts were relevant to any pertinent issues of law presented.